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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-448

AL A. MARTH, as Trustee in Bankruptcy of Pete Horner Excavating, Inc., an Arizona Corporation,

Petitioner,

v.

MARTHA MAYTAG DANNERBECK, and OSCAR C. PALMER, Sr., and CORRINE E. PALMER, his wife,

Respondents.

REPLY BRIEF ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

HUGHES & HUGHES, P.C.
By John C. Hughes
411 North Central Avenue
Phoenix, Arizona 85004
(602) 252-8001
Attorneys for Petitioner

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The response of the respondent Dannerbeck by inference and half truth attempts to convince the Court that at the time the suit was filed the respective interest of the Dannerbecks and the surety companies were separate and apart and that the sureties were therefore entitled to establish jurisdiction and diversity. The inference and half truth will not stand scrutiny of the record. It was *Mrs. Dannerbeck's* Phoenix attorney that filed the lawsuits naming the surety companies as plaintiffs. And, as is clearly established by letter from Mrs. Dannerbeck's Iowa attorney, Francis C. Miller dated July 26, 1966, a conference call had taken place on *July 22, 1966* in

the course of which the arrangements for the trust account to be opened in Phoenix had been made. *July 22, 1966 was the same date on which the lawsuits had been filed.* The first paragraph of the letter to which we refer reads as follows:

> "In accordance with our conference phone call last Friday, *July 22*, including you and *Ken Sherk* at Phoenix, Frank Sanders at Chicago and myself at Newton, I am enclosing a check drawn on Mrs. Martha Maytag Dannerbeck Investment Account dated July 28, 1966 payable to your firm - Moore, Romley, Kaplan, Robbins & Green - for the sum of $100,000.00, the proceeds of which to be deposited by you in an account out of which you may withdraw to reimburse either of the two bonding companies - *United States Fidelity and Guaranty Co. and National Union Fire Insurance Company of Pittsburgh, Pa.* - for those items for which the *Dannerbecks* are liable under the indemnity agreements executed by them on behalf of Pete Horner Excavating Co."

It is difficult indeed to believe in the face of such record that the respondents can seriously expect this Court to believe that it was the surety companies who were the real parties in interest at the time the lawsuits were instituted. The respondent's brief uses the word "reimburse". However, this also is contrary to the record. Mrs. Dannerbeck never reimbursed the surety companies. She settled the claims and paid them in advance. The part of the sureties in the transactions was merely to go through the motions of appearing to make the payments to create the paper sham for this lawsuit. A classic example of form over substance.

The Dannerbeck representations as to the lack of diversity jurisdiction is equally without merit. Lack of federal jurisdiction cannot be waived or overcome by agreement of the

parties. *Mitchell v. Maurer*, 55 S. Ct. 162, 293 U.S. 237, 79 L. Ed. 338 *and may be raised at any stage of the proceedings. Peale v. Phepps*, 55 U.S. 368, 14 How. 368, 14 L. Ed. 549; *City of Gainesville v. Brown Investment Co.*, 48 S. Ct. 454, 277 U.S. 54, 72 L. Ed. 781, *cert. denied*, 50 S. Ct. 27, 280 U.S. 569, 74 L. Ed. 622; *Matson Nav. Co. v. U.S.*, 52 S. Ct. 162, 284 U.S. 352, 76 L. Ed. 336.

Even if the parties failed to raise the issue or consent that the case be considered on the merits, this Court must still examine and determine if jurisdiction existed. *Metcalf v. Watertown*, 128 U.S. 586.

In *Louisville and Nashville R. R. v. Mottley*, 29 S. Ct. 42, 211 U.S. 149, 53 L. Ed. 126 (1908) this Court said

> "Neither party has questioned that jurisdiction, but *it is the duty of this court to see to it that the jurisdiction of the Circuit Court which is defined and limited by statute, is not exceeded.* This duty we have frequently performed of our own motion. Mansfield & c RR Co. v. Swan, 111 U.S. 379, 382; King Bridge Co. v. Otoe County, 120 U.S. 225; Blacklock v. Small, 127 U.S. 96, 105; Cameron v. Hodges, 127 U.S. 322, 326; Metcalf v. Watertown, 128 U.S. 586, 587; Continental National Bank v. Buford, 191 U.S. 199."

It is true that jurisdiction can depend on the state of things at the time the action is brought. But, this is assuming that there is no misrepresentation or feigned allegations made solely for the purposes of establishing jurisdiction. *England Builders, Inc. v. Shea*, 359 F.2d 927 (10th Cir.). Here it was established that Mrs. Dannerbeck was the real party in interest at the time the lawsuit was filed. However, there was no mention of her in the original Complaints or that the actions were being filed under the express trust and on her behalf. If there had been, clearly objection could have been

raised at that time. The citizenship of the real party in interest is the governing factor. There was no change in the situation subsequent to the lawsuit being filed. Mrs. Dannerbeck's position was simply an undisclosed factor. We submit therefore that the consent of the Bankruptcy Court having been obtained through misinformation and nondisclosure to the Bankruptcy Court, and diversity jurisdiction having been established by feigned allegations, the judgment of the lower courts must be set aside for lack of jurisdiction.

We are not, as is contended, in the response, asking the court to review a factual situation. There is little or no dispute on the facts. What we are asking is that this Court review what we believe to be a decision which seriously conflicts with the established law. We do not believe that the law will allow a principal in a closely held corporation to profit at the expense of the general creditors without proving the claim in the Bankruptcy Court.

The respondent further calls for an application of a rule of law that an indemnitor who has fulfilled his obligation to a surety is entitled to subrogation. However, the rule of law as shown by the decision cited in the Ninth Circuit opinion only allows an innocent indemnitor to pursue the ultimate wrongdoer so that the loss is borne by the one responsible for creating it. In this case, Mrs. Dannerbeck is one of the persons responsible for the loss. She is not an innocent third party but a major figurehead in the financing structure of the corporation and a community stockholder. *Her indemnity contract with the surety did not provide for any subrogation rights whatsoever.* In fact it had her warrant that she was a principal for whom the suretyship was given. If she is a principal she is not entitled to subrogation.

The argument as to the contract funds never becoming a part of the bankrupt estate has been raised again and again and again, but there has never been authority cited or argument raised against the proposition that if there had been a surplus it would have belonged to the estate. *Marks v. Brucker*, 434 F.2d 897 (9th Cir. 1972); *In re Community Neighbors, Inc.*, 287 F.2d 572 (7th Cir. 1961); 3 *Collier on Bankruptcy*, 14th Ed. 57.17. If Mrs. Dannerbeck's claim had been denied there would have been a surplus. What we have apparently never been able to convince the courts below is that if Mrs. Dannerbeck had put her money where her paper was, *i.e.*, backing the corporation, the situation may never have arisen and even if it had she never would have been given a place ahead of the general creditors. *Pepper v. Litton*, 308 U.S. 295, 60 S. Ct. 238, 84 L. Ed. 281, would have been surely applicable as also *Braddy v. Randolph*, 352 F.2d 81 and the other cases cited in the Petition.

CONCLUSION:

There are special and important reasons why this Writ should be granted. The decision on its face creates bad law which can only lead to confusion in bankruptcy and we respectfully submit that the Writ of Certiorari should issue.

HUGHES & HUGHES, P.C.

By John C. Hughes
Attorneys for Petitioner

November, 1974.

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